UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PAUL SAMUEL JOHNSON,

Plaintiff,

v.

THE SONOMA COUNTY MAIN ADULT DETENTION FACILITY, et al.,

Defendants.

Case No. 14-cv-05397-CW (PR)

ORDER DENYING, WITHOUT PREJUDICE, MOTIONS TO PROCEED IN FORMA PAUPERIS UNDER 28 U.S.C. SECTION 1915(G) AND GRANTING PLAINTIFF LEAVE TO FILE AN AMENDED COMPLAINT

Re: Dkt. Nos. 2, 4

On December 9, 2014, Plaintiff Paul Samuel Johnson, a state prisoner currently incarcerated at the Sonoma County Main Adult Detention Facility (Sonoma County Jail), filed a pro se civil rights action pursuant to 42 U.S.C. § 1983 for alleged constitutional violations that occurred while he was incarcerated at the Sonoma County Jail. Plaintiff has also filed two motions to proceed in forma pauperis (IFP). For the reasons discussed below, the Court finds that Plaintiff has three strikes under 28 U.S.C. § 1915(g) and denies his applications to proceed IFP, without prejudice to his showing that his complaint alleges that he was in imminent physical danger at the time he filed it.

LEGAL STANDARD

A prisoner may not bring a civil action IFP under 28 U.S.C. § 1915 "if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a

claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g).

For purposes of a dismissal that may count under § 1915(g), the phrase "fails to state a claim on which relief may be granted" parallels the language of Federal Rule of Civil Procedure 12(b)(6) and carries the same interpretation; the word "frivolous" refers to a case that is "'of little weight or importance: having no basis in law or fact,'" and the word "malicious" refers to a case "filed with the 'intention or desire to harm another.'" Andrews v. King, 398 F.3d 1113, 1121 (9th Cir. 2005) (citation omitted). Only cases within one of these three categories can be counted as strikes for § 1915(g) purposes, so the mere fact that a plaintiff has filed many cases does not alone warrant dismissal under § 1915(g). Id. Rather, dismissal of an action under § 1915(g) should only occur when, "after careful evaluation of the order dismissing an [earlier] action, and other relevant information, the district court determines that the action was dismissed because it was frivolous, malicious or failed to state a claim." Id. A dismissal under § 1915(g) means that a prisoner cannot proceed with his action IFP under § 1915(g), but he still may pursue his claims if he pays the full filing fee at the outset of the action. Tierney v. Kupers, 128 F.3d 1310, 1311 (9th Cir. 1997).

DISCUSSION

I. Plaintiff's Strikes

On April 2, 2015, the Court dismissed one of Plaintiff's previous cases, Johnson v. Hanna, et al., C 14-1300 CW (PR),

without prejudice to filing it as a paid complaint because Plaintiff had at least three previous cases that were dismissed on grounds that qualified as strikes under 28 U.S.C. § 1915(g) and his complaint did not make a plausible allegation that he faced imminent physical danger at the time he filed it. See Johnson v. Hanna, C 14-1300 CW (PR), Dkt. No. 29.

These dismissals count as strikes under § 1915(g) in this case, also. They are as follows:

(1) Johnson v. Cate, case no. C 11-2749 MCE CKD (E.D. Cal.), where the Court dismissed the complaint after notifying Plaintiff "that his complaint failed to state a claim and he did not correct the deficiencies identified by the Court." Hanna, C 14-1300 CW (PR) at 3-4 (citing O'Neal v. Price, 531 F.3d 1146, 1154 (9th Cir. 2008) (dismissal without prejudice counts as a strike under § 1915(g) if it is based on the action's frivolousness, maliciousness or failure to state a claim)).

(2) Johnson v. Cate, case no. C 12-0598 GGH P (E.D. Cal.), where

> the Court dismissed Plaintiff's complaint because it was "not clear what plaintiff's claims are." Plaintiff was granted leave to amend and was granted two extensions of time in which to file an amended complaint. Plaintiff failed to file an amended complaint and, on October 16, 2012, the Court dismissed the complaint because the allegations were unclear and unintelligible and for failing to follow the court's instructions.

Hanna, C 14-1300 CW (PR) at 4.

(3) Johnson v. Alison, app. no. 12-17463 (9th Cir.), where

> the Ninth Circuit issued an order finding that Plaintiff's appeal was frivolous and, as a result, concluded he was not entitled to IFP status on appeal. On January 11, 2013, the appeal was ultimately dismissed for

> failure to pay the filing fee. Because the Ninth Circuit found the appeal to be frivolous, the dismissal of the appeal qualifies as a strike under § 1915(g).

Hanna, C 14-1300 CW (PR) at 4-5.

(4) Johnson v. Toby, case no. 11-1975 CW (PR) (N.D. Cal.), where

> the Court conducted an initial review of the complaint and found the allegations failed to state a claim upon which relief could be granted. The Court also dismissed Plaintiff's amended complaint for failure to state a claim but granted Plaintiff an additional twenty-eight days to file a second amended complaint to cure the noted deficiencies. The Court dismissed the action when Plaintiff failed to file a second amended complaint; judgment was entered accordingly. The dismissal of this case for failure to state a claim upon which relief may be granted qualifies as a strike under § 1915(g).

Hanna, C 14-1300 CW (PR) at 5.

(5) Johnson v. City of Santa Rosa, case no. 12-1409 CW (PR) (N.D. Cal.), where

> the Court dismissed Plaintiff's complaint for failure to state a claim upon which relief may be granted and also granted his request to proceed IFP. On December 3, 2012, the Court revoked Plaintiff's IFP status because he was no longer incarcerated. On December 27, 2012, the Court dismissed the action and entered judgment because Plaintiff had not paid the filing fee or submitted a completed non-prisoner IFP application. Because this action was dismissed for failure to state a claim and Plaintiff failed to correct the pleading deficiencies, the dismissal of this case counts as a strike under § 1915(g).

Hanna, C 14-1300 CW (PR) at 5.

Because more than three of Plaintiff's cases were dismissed on grounds that qualify as strikes under § 1915(g), he can only proceed IFP in this action if he qualifies for the imminent danger exception. See Andrews v. Cervantes, 493 F.3d 1047, 1053

(9th Cir. 2007).

II. "Imminent Danger" Exception

The "imminent danger" exception "applies if the complaint makes a plausible allegation that the prisoner faced imminent physical danger at the time of filing" the complaint. Id. at 1055. The complaint is the focus of the inquiry. Id.; Abdul-Akbar v. McKelvie, 239 F.3d 307, 312 (3d Cir. 2001) (en banc). Courts may reject allegations that are "overly speculative and fanciful." Andrews, 493 F.3d at 1056-57, n.11. The plaintiff must show a nexus between the imminent danger alleged in the complaint and the claims it asserts. Pettus v. Morgenthau, 554 F.3d 293, 299 (2nd Cir. 2009). This means that the plaintiff must show that: (1) the imminent danger of serious physical injury is fairly traceable to the unlawful conduct asserted in the complaint; and (2) a favorable judicial outcome would redress that injury. Id.

In his complaint, Plaintiff names the following individuals as Defendants: Sheriff Frietas; Assistant Sheriff Walker; Dr. Fadoki; ADA Coordinator Johnson; and "DGO Sulley." The complaint alleges that, during the time Plaintiff was a prisoner in the custody of the California Department of Corrections and Rehabilitation, until he was released on parole on October 12, 2014, he was prescribed narcotic pain medications for his spine and hip diseases, mobility devices for his mobility problems, orthopedic shoes, a double mattress and a double pillow. Comp. at 3.[1] During that time, Plaintiff took six narcotic pain pills

[1] Page numbers are from the Court's electronic case management docketing system.

every day. Id.

The complaint alleges that Plaintiff was sent to the Sonoma County Jail twice in the last thirty days for parole violations—in mid-October for five days and on November 12, 2014. Comp. at 5. It alleges that Sonoma County Jail Doctor Fadoki refused to prescribe Plaintiff his "correct medications ever since she began working here [Sonoma County Jail] about 4 years ago." Comp. at 6. Each time Plaintiff has seen Dr. Fadoki, she "has denied to treat" him and has told him that she has turned the jail into a "non-narcotic" facility and "will not issue those level [sic] of pain meds to me no matter how badly I'm in pain." Id. Dr. Fadoki refuses to treat Plaintiff or to look at his medical record. Comp. at 13. ADA Coordinator Johnson also refuses "to honor" Plaintiff's medical records. Id. "DGO Sulley" has denied Plaintiff's appeals.[2] Id.

The complaint also alleges that Assistant Sheriff Walker has taken away all inmate rights over the last fifteen years, illegally charges inmates $3.26 each week for "welfare bags" and taxes inmate accounts. He encourages the practices of "yard counseling,"[3] sensory deprivation cells and indeterminate confinement in administrative segregation. Comp. at 11. The complaint alleges that Plaintiff has been "yard counseled"

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[2] Because this allegation appears in the paragraph discussing Plaintiff's medical treatment, the Court assumes it refers to Plaintiff's appeals of his medical treatment.

[3] According to Plaintiff's allegations, if the guards "feel an inmate is a problem," they force the inmate out of his cell and into the yard in handcuffs and proceed to beat, choke and suffocate him. This is known as "yard counseling." Comp. at 7.

twenty-five times in the last fifteen years because the guards enjoy it and think they can get away with it. Comp. at 10. It also alleges that, on two separate occasions, Assistant Sheriff Walker came into Plaintiff's cell and threatened to kill him because he has filed civil rights complaints. Assistant Sheriff Walker laughed at Plaintiff, called him an "asshole," and had his guards slam Plaintiff to the floor as he walked out. Comp. at 12.

As Plaintiff's complaint is plead, it does not allege that he was in imminent danger at the time he filed it. In Johnson v. Hanna, case no. C 14-1300 CW (PR), Plaintiff similarly alleged that a doctor at San Quentin State Prison had refused to prescribe him pain medications, specifically Tylenol #3. Id. at 7. The Court found that Plaintiff's allegations were insufficient to show that he was in imminent danger of physical injury from the doctor's actions, especially because he was soon transferred from San Quentin to another institution. Id.

The allegations about the denial of Plaintiff's pain medication in this complaint are similar. From the allegations, it appears that Plaintiff has been released on parole but, due to parole violations, he has been re-incarcerated at least twice. Therefore, his allegations of recent denial of pain medication appear to be for short periods of time. See Andrews, 493 F.3d at 1056-57 (continuing harm must be alleged as a result of being denied medication); White v. Colorado, 157 F.3d 1226, 1231 (10th Cir. 1998) (allegations of imminent danger due to withheld medical treatment must be more than conclusory assertions); McNeil v. United States, 2006 WL 581081, *3 (W.D. Wash.)(same).

Other allegations focus on Dr. Fadoki's conduct that occurred many years ago. These allegations are insufficient to show imminent physical danger at the time Plaintiff filed his complaint.

The conclusory allegations against ADA Coordinator Johnson and DGO Sulley do not show imminent danger or even state a cognizable claim against them.

The allegations that Plaintiff was subjected to "yard counseling" might show imminent danger. However, Plaintiff appears to be alleging that the yard counseling and other incidents of physical violence against him occurred when he was incarcerated at Sonoma County Jail many years ago. Thus, these allegations are insufficient to show that Plaintiff was in imminent physical danger on December 9, 2014, at the time he filed his complaint. However, the Court grants Plaintiff leave to clarify his allegations in an amended complaint to determine if it alleges he was in imminent physical danger at that time.

CONCLUSION

For the foregoing reasons, the Court orders as follows:

1. Plaintiff's motions to proceed IFP are denied without prejudice to Plaintiff's alleging in an amended complaint, if he truthfully can do so, that he was in imminent physical danger on December 9, 2014, when he filed his original complaint.

2. Plaintiff may, but is not required to, file an amended complaint within twenty-eight days from the date of this Order. If Plaintiff fails to submit an amended complaint within twenty-eight days, his motions to proceed IFP will be denied with prejudice and this action will be dismissed without prejudice to

Plaintiff refiling it with the full filing fee.

If Plaintiff files an amended complaint, he shall use the court's civil rights complaint form, a copy of which is provided herewith, and include in the caption both the case number of this action, No. C 14-5397 CW (PR), and the heading "AMENDED COMPLAINT." Because an amended complaint completely replaces the original complaint, Plaintiff must include in it all the claims he wishes to present. See Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992). Plaintiff may not incorporate material from the original complaint by reference.

3. It is Plaintiff's responsibility to prosecute this case. He must keep the Court informed of any change of address and must comply with the Court's orders in a timely fashion.

Failure to do so may result in the dismissal of this action, pursuant to Federal Rule of Civil Procedure 41(b), for failure to prosecute.

4. The Clerk of the Court shall provide Plaintiff with a blank civil rights complaint form.

5. This Order terminates docket numbers 2 and 4.

IT IS SO ORDERED.

Dated: 04/15/2015

CLAUDIA WILKEN
United States District Judge